No. 87-352

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payments of suspended proceeds or royalties pursuant to FPC Opinions or FERC,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Sun's brief pertains mostly to statute of limitations. This is not an issue. The case was reversed and remanded "in the light of *Shutts II*." *Shutts II* contains nothing whatsoever about statute of limitations. Sun relies on a dissenting opinion in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), 73 S. Ct. 856. Sun wants this court to grant certiorari and overrule the majority holding in *Wells* which has been good law for many years.

1. Is statute of limitations an issue in this case?

2. If it is, is Sun entitled to certiorari for this court to re-examine the *Wells* case, whether it should overrule it, make Sun's requests on statute of limitations a constitutional matter in this case and overrule the Supreme Court of Kansas on the statute of limitation matter?

3. Sun agrees that interest is due the royalty owners. Sun asserts that interest should be paid at rates set by statutes in the other states.

The Kansas Supreme Court has examined the laws of the states involved and has found that each of these states would allow interest at the FERC rates if the Courts of each case had the issue squarely presented. The Kansas Supreme Court found that under the unique facts of this case, that the other states would allow interest at FERC rates, rather than at the general rate set by statute where there is no agreement as to interest. The question to be decided on Sun's Petition is whether this Court should review the Kansas Court's determination of the laws of the other states.

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This case was heard by a different Trial Court than *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797. When reversed and remanded by this Court "in the light of *Shutts,*" it was remanded by the Kansas Supreme Court to the Trial Court, Honorable Clarence E. Renner, Trial Judge. Judge Renner heard the case again, and after suggested findings of fact and conclusions of law by both sides, made his Memorandum Decision filed July 14, 1986, and appearing at Appendix to Petition for Certiorari, A14 et seq. Sun appealed to the Kansas Supreme Court. Both sides filed briefs. The case was argued to the entire court and opinion was filed March 30, 1987. Sun filed Motion for Rehearing as to the statute of limitations question. After opinion was filed on the motion, Sun has filed Petition for Certiorari.

NATURE OF THE CASE

This is an action in equity by a class consisting of Sun's gas royalty owners against Sun to collect interest or damages for the use by Sun of the royalty owners' money. Instead of paying out the royalty share of the higher prices, Sun instead notified its royalty owners that it was suspending the increased royalties pending approval by the courts of the gas rate increases allowed by FERC (Federal Energy Resources Commission, formerly Federal Power Commission). Sun did not actually suspend the increased royalty money by placing it in a suspense account which would draw interest, but instead, placed the money in its general cash account, just as any other income it may have received and used it to make profit for Sun and its shareholders.

This is a reversal and remand by the U. S. Supreme Court to re-examine the interest laws of other states where Sun has the oil and gas leases giving rise to the royalties "suspended" and used by Sun. Almost identical facts, excepting for numbers and territory involved was before the Kansas Supreme Court in *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978). The present case of *Shutts, et al. v. Phillips Petroleum Co.*, 240 Kan. 764 (1986), is before this Court now on Petition for Cert., *Phillips Petroleum Co. v. Shutts, et al.*, No. 87-384.

STATEMENT OF THE CASE

On remand from the U. S. Supreme Court, the Kansas Supreme Court first sent the case back to the Trial Court for re-examination "in the light of the U. S. Supreme Court

Opinion in the *Shutts* case." (472 U.S. 797—1985.) The Trial Court re-examined interest laws of other states and came to the same conclusion as before regarding interest allowable in other states and the interest rate.

The Kansas Supreme Court affirmed the Trial Court again, saying, "*Shutts* (240 Kan. 764—1986) is controlling here and requires us to find the District Court applied the proper prejudgment interest rate to the suspended royalties."

In *Shutts, Executor, et al. v. Phillips*, 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978), an area consisting of all of the State of Kansas and parts of the States of Texas and Oklahoma was involved. This was one of seven pricing areas of the FPC at the time. Later, with Opinion 699, involved in this case, the FERC (formerly FPC) abandoned area-wide pricing and began nation-wide pricing because natural gas was bought, distributed and sold nation-wide, not just area-wide. Pricing being nation-wide, Sun changed its accounting system and the class affected by Sun's actions became nation-wide rather than area-wide.

Kansas in a number of cases and all other states that have examined the question of equity in requiring gas producers to pay interest on their royalty owners' money held and used rather than being paid out, have required the gas producers to pay interest to their royalty owners.[1]

Sun raises no defense to the general and universal proposition in equity that where one uses another's money to make a profit for himself, he must pay for its use.

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1. *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527; *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195; *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Texas); *Boutte v. Chevron Oil Company*, 316 F. Supp. 524.

Rather, Sun raises defenses based on statutes of limitation and claims that other states have different interest rates that should apply.

Plaintiff class consists of the landowners, those who originally owned the oil, gas and other minerals in and under the land, and also certain assignees of interest in the oil, gas and other minerals. They have leased for exploration, development and production of oil and gas to Sun or to brokers who have assigned to Sun, and Sun, under the terms of the oil and gas leases, customarily pays out 1/8th of the proceeds of sale of gas produced to those royalty owners monthly. The other 7/8ths of the gas produced ordinarily is retained by the lessees, such as Sun.

In order to obtain a price increase for gas sold by Sun to the gas producers, certain rate schedules had to be filed with the FERC, setting forth the increase, and FERC approval of the increase was necessary under federal regulations. In Opinions 699, 749 and 770, FERC did approve certain rate increases. Sun collected the rate increases. Sun has had the free use of 7/8ths of the gas and the rate increases thereon, without interest. This suit involves interest only on the 1/8th share of the oil and gas rate increases held by Sun and used by Sun rather than being paid to the royalty owners.

Total judgment in this case, at FERC rates, is estimated to be $800 000.00. Total interest under the rate schedules involved in this case in August, 1979, when the case was filed, is estimated to be only about $300,000.00. The increase to $800,000.00 is accounted for by Sun's continued contest of the case rather than paying the interest due when the case was filed. Payment of $1.00

interest to its royalty owners in 1979 would have prevented the payment now of approximately $2.50.

The following are the essential facts as quoted from Kansas Supreme Court Opinion, Appendix to Petition, Page A3:

> "While the facts in this case were set forth in some detail in our previous opinion, they will be summarized here for reference purposes.
>
> "During the 1960's and 1970's, Sun Oil Company applied to the Federal Power Commission (FPC) for gas price rate increases. While waiting for approval of such increases, Sun charged its purchasers the increased rates, but withheld the increased gas royalties from the owners of the mineral leaseholds.
>
> "In order to qualify for the price increases, the FPC required Sun to enter into an undertaking which required it to refund to its purchasers any price increases not ultimately approved together with interest at rates established by the Federal Energy Regulatory Commission (FERC) thereon. Sun then informed its royalty owners that payment of the increased price would be suspended until final approval of the rate increases.
>
> "In July of 1976, pursuant to FPC Opinions 699 and 699H, Sun paid $1,167,000.00 in suspended royalties to owners of oil and gas leaseholds in six states. Texas, Oklahoma, Louisiana, New Mexico. Mississippi and Kansas. This payment was a result of price increases collected by Sun between July. 1974 and April, 1976.

"In April of 1978, pursuant to FPC Opinions 770 and 770A, Sun paid suspended royalties in the amount of $2,676,000.00 to royalty owners with property in the six states listed. This payment resulted from price increases collected by Sun between December, 1976 and April, 1978.

"This suit was filed on August 30, 1978, to recover prejudgment interest on the suspended gas royalties and were subsequently certified as a class action. Notice of the action was sent to 3,159 class members. Of these, 105 members 'opted out' of the class, although none of the members were supplied with a request for exclusion ('opt out') form.

"The District Court determined prejudgment interest was due from Sun to the royalty owners and applied an interest rate derived from Sun's corporate undertaking with the FPC. (Sun had agreed to interest rate to be paid on accumulated amounts of unapproved price increases refunded to gas purchasers.) . . ."

SUMMARY OF ARGUMENT

1. Statute of limitations is not really an issue. The case was remanded by this Court for further consideration in the light of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). There is nothing in *Shutts* about statutes of limitations and never has been. Sun keeps trying to bring up the issue, even though it is a dead issue.

2. Even if statute of limitations were an issue, no constitutional question is raised in this case involving

limitations. Limitations issues ordinarily are procedural and are governed by the law of the forum.

3. The equity rate—FERC rate—should apply. Statutory rates apply only where no contract exists governing interest rates on the same money. That is not true in this case. The FERC rate has become a part of the money due with the suspense royalties. (*Sid Richardson Carbon & Gas Co. v. Phillips Petroleum Co.*, 456 F.2d 203 (1972).)

4. There is no authority in any of the states involved which is contrary to the determinations of state law made by the Kansas Supreme Court. Federal Courts in Louisiana and Texas have said that when the suspended monies were finally paid, that interest would be due the royalty owners at FERC rates. Some Texas Courts have awarded interest at the statutory rate of 6%, but the Texas State Courts have never ruled on a claim for FERC rates vs. the statutory rate.

ARGUMENT

I. Statute of Limitations Is Not Really an Issue

When Sun filed Petition for Certiorari in this case before, it argued statute of limitations questions. This Court granted certiorari with a short opinion saying that the case was being reversed and remanded "in the light of *Shutts*." There is nothing about statute of limitations in *Shutts* and never has been. If statute of limitations is an issue, it never was raised by Philips in *Shutts*, and this Court said nothing about statute of limitations in reversing and remanding.

But Sun continues to argue statute of limitations as though this Court reversed and remanded on that ground. The Kansas Supreme Court affirmed the Trial Court's opinion in this case, and did address the statute of limitations question. It said:

> "First, it should be noted that, in Phillips, the Supreme Court was concerned with the substantive conflict between Kansas law and the laws of the states in which the gas leaseholds were located. That substantive conflict related to the interest to be applied to royalty payments—an issue already resolved by this court.
>
> "Generally, limitation statutes are considered as being remedial or procedural in their application, and do not affect the substantive rights of the litigants. (51 Am Jur 2d, *Limitation of Actions*, Section 21, Page 605.) Accordingly, we hold that Phillips does not require application of the various state's statutes of limitations and the District Court did not err in applying the Kansas five year statute of limitations to the claims of nonresident class members." (Petition A11.)

Sun filed a Motion for Rehearing strenuously arguing the statute of limitations question. Order of the Kansas Supreme Court was filed June 8, 1987, denying the Motion for Rehearing and stating that the Kansas Borrowing statute, K.S.A. 60-516 is inapplicable in this case because it applies only where the cause of action has arisen in another state and here, the causes of action arose in Kansas and other states.

Sun's argument on statute of limitations is not something that should be before this Court and is no reason to grant certiorari.

II. Statute of Limitations Not a Constitutional Question

Sun relies on *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930). It is not analogous to this case. In *Home*, a Mexican insurance contract was sued on in Texas, where there was a two year statute of limitations. The Court held that the action was limited to one year, not by Mexican law, but by the terms of the insurance contract itself. It is further said in *Home*, at 281 U.S. 409:

> "And, in the absence of a contractual provision, the local statute of limitation may be applied to a right created in another jurisdiction even where the remedy in the latter is barred. In such cases, the rights and obligations of the parties are not varied."

In *Wells*, supra, this Court said:

> "Long ago, we held that applying the statute of limitations of the forum to a foreign substantive right did not deny full faith and credit. (*McElmoyle v. Cohen*, 1839, 13 Pet. 312, 10 L.Ed. 127; *Townsend v. Jemison*, 1850, 9 How 407, 13 L.Ed. 194; *Bacon v. Howard*, 1857, 20 How 22, 15 L.Ed. 811. . .
>
> "The rule that the limitations of the forum apply (which this court has said meets the requirements of full faith and credit) is the usual conflicts rule of the states."

In *Keeton v. Hustler*, 465 U.S. 770 (1984), this Court said:

> "Under traditional choice of law principles the law of the forum state governs on matters of procedure." (Footnote No. 10.)

In Volume 51 Am Jur 2d, *Limitation of Actions*, Section 21, it is stated:

> "Generally speaking, statutes of limitation which are not a part of the right of action are procedural only, while conditions as to time which are contained in a statute which creates a right are a part of the substantive law creating the right of action. A true limitation statute is ordinarily considered as being remedial or procedural in its application, in no manner affecting the substantive rights of the litigants."

. . .

In *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 it is said:

> "Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law. There has been controversy as to their effect. Some are of opinion that like the analogous civil law doctrine of prescription limitations statutes should be viewed as extinguishing the claim and destroying the right itself. Admittedly it is troublesome to sustain as a 'right' a claim that can find no remedy for its invasion. On the other hand, some common-law courts have regarded true statutes of limitation as doing no more than to cut off resort to the courts for enforcement of a claim. We do not need to settle these arguments.
>
> "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizens from

> being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of R. Telegraphers v. Railway Exp. Agency*, 321 U.S. 342, 349, 88 L.Ed. 788, 792, 64 S. Ct. 582. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.
>
> "This Court, in *Campbell v. Holt*, adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitations go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value."

See also, *Townsend v. Jemison*, 9 How 407:

> "The rule in the courts of the United States in respect to pleas of the statutes of limitations has always been, that they strictly affect the remedy, and not the merits."

If this case had been brought in one of the other states, the limitation law applying would probably be of no benefit to Sun. All the states recognize longer limitations periods for actions on written contracts. At the base of the claims here are the written oil and gas leases.

Under settled law, Kansas (and each other state) has the right to prescribe its own public policy about the privilege to litigate and to set its own period of limitation. There is no need to reclassify limitations periods as "substantive" rather than "procedural." Such reclassification would upset an ancient and workable concept to no good purpose.

III. Equity Rate—FERC Rate—Should Apply

The FERC rate has been held many times to be an equitable interest rate to prevent unjust enrichment to gas producers.[2]

The Kansas Court applied the FPC rate in six similar class action cases in Kansas, and it was paid by the gas producers.[3]

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2. *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 15 L.Ed. 284, 86 S. Ct. 360, Syl. 9; *Terrace, Inc. v. Federal Power Commission*, 290 F.2d 149 (1961); *Mississippi River Fuel Corp. v. FPC*, 281 F.2d 919 (1960); *Brooklyn Union Gas Co. v. Transcontinental Gas P. L. Corp.*, 201 F. Supp. 679 (1960); *Continental Oil Co. v. FPC*, 378 F.2d 510; *In Re Permian Basin Area Rate Cases*, 88 S. Ct. 1344 (1968); *Skelly Oil Co. v. FPC*, 401 F.2d 726 (1968).

3. *Nix v. Northern Natural Gas Producing Co.*, 222 Kan. 739, 567 P.2d 1322 (1977), cert. denied, 434 U.S. 1067 (1978); *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 (1977), cert. denied, 434 U.S. 1067 (1978); *Maddox v. Gulf Oil Corporation*, 222 Kan. 733, 567 P.2d 1326 (1977), cert. denied, 434 U.S. 1065 (1978); *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978); *Helmley v. Ashland Oil, Inc.*, 1 Kan. App.2d 532, 571 P.2d 345 (1977); *Gray v. Amoco Production Co.*, 1 Kan. App.2d 388, 564 P.2d 579 (1977), modified, 223 Kan. 441 (1978).

The Louisiana Court in *Bouite v. Chevron*, 316 F. Supp. 524, said that FERC interest would be payable on the suspense royalty by Chevron when paid.

In Texas, in *Sid Richardson Carbon & Gas Co. v. Phillips Petroleum Co.*, 456 F.2d 203 (1972), Phillips was ordered to pay interest on suspense royalties at FPC rates. The Court further said:

> "Phillips contends that the Texas law prohibits the award of interest on interest. . . We think Phillips misses the mark on this argument. . . The sum found due is technically interest. In substance, however, it is a part of the sum necessary under the holding of the District Court to place Richardson in parity with El Paso under the contract. Once that sum was determined, *it became a part of the whole.* Interest was due on so much of the whole as remained unpaid after January 31, 1969." (Emphasis supplied.)

Sun's royalty owners had a legal and equitable right to expect Sun to pay for the use of their money. Sun should have expected to pay for the use of the money. Payments of suspense royalties without interest or mention of interest by Sun was done deliberately, intentionally and knowingly in violation of its royalty owners' rights and interests. Certainly the rulings in this case were no surprise to Sun and it would have been arbitrary and unfair to the Sun royalty owners had they not been allowed interest as was done in the other cases cited in footnote above.

Sun contends that the Kansas Supreme Court ignored contrary Texas law as set out in *Phillips Petroleum Co. v. Stahl*, 569 S.W.2d 480 (Texas, 1978). Stahl asked for

and was awarded interest at the rate of 6% per annum. Phillips' liability for interest at a higher rate was not presented to the Texas Supreme Court, nor did the Texas Supreme Court rule on that point. The *Stahl* case is simply not authority for a *limit* of 6% interest. The issue of whether interest should be allowed at the 6% statutory rate *or* at FERC rates was not presented in the *Stahl* case and was not ruled on by the Texas Courts.

As to the statutory interest rate in *Stahl*, a decision is not a precedent unless the issue is argued and presented to the court. (Corpus Juris Secundum, *Courts*, Section 186.) In *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, 97 L.Ed. 54, 73 S. Ct. 67, it is said:

> "Even as to our own judicial power or jurisdiction. this court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio."

See also *United States v. More*, (U.S.) 3 Cranch 159, 2 L.Ed. 397. In 20 Am Jur 2d, *Courts*, Section 190, it is stated:

> "It is only a judicial decision on a point of law that is stare decisis, and it is not enough that the point was considered in the prior case; it must have been decided. Stated otherwise no opinion is an authority beyond the point actually decided. It follows that a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion."

See *United States v. Mitcheli*, 271 U.S. 9. 70 L.Ed. 799, 46 S. Ct. 418, where it is said:

> "That question was not presented to the court for decision, and no such question was considered or decided. It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered."

See also, *Webster v. Fall*, 266 U.S. 507, 69 L.Ed. 411, 45 S. Ct. 148:

> "Counsel for appellant directs our attention to other cases, where this court proceeds to determine the merits notwithstanding the suits were brought against inferior or subordinate officials without joining the superior. We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

Chief Justice Schroeder in the last *Shutts* opinion pointed out that the issue of 6% interest versus interest at FERC rates has not been determined by the Texas Supreme Court. He said:

> "No Texas Court ever mentioned the higher rates set by federal regulations to which Phillips had agreed to comply in its corporate undertaking. See *Phillips Petroleum Co. v. Adams*, 513 F.2d 355 (5th Cir.

1975), cert. denied, 423 U.S. 930 (1979); *Phillips Petroleum Co. v. Hazelwood*, 409 F. Supp. 1193; *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 488 (Texas, 1978). *This issue has not been determined by the Texas Supreme Court.*" (Appendix to Phillips' Brief, Kansas Supreme Court Opinion, 20a.)

Surely, there can be no constitutional question involved in the Kansas Courts applying the FERC rate, the equitable rate, rather than the statutory rate, when the issue of statutory rate versus equitable rate was not decided in the *Stahl* case.

IV. Judge Renner's Opinion

Honorable Clarence E. Renner in his Memorandum Decision on Remand of this case, in 1986, said in part as follows:

> "The Court has again carefully examined the case law and statutory law of Texas, Oklahoma, Louisiana, New Mexico and Mississippi and compared the laws of each state to the general contract interest law and equitable or moratory interest law as applied by the Kansas Court in *Shutts I* and *Shutts II;* and in this case, I find that all of those states allow a higher interest rate if there is a contract or specific agreement calling for a higher rate of interest, or in situations where equity would require a higher rate; that the equitable or moratory rate is the FERC rate, not the statutory rate; and that there is no conflict with the allowance by the Kansas Court of a contract rate or an equitable agreed rate of interest, the FERC rate, herein to royalty owners resident in other states named above.

> "Although plaintiffs' remedy, the recovery of interest, sounds in equity, the nature of the action is the enforcement of a written agreement which is governed in Kansas by K.S.A. 60-511 and governed in the other states named above by similar statutes concerning payment of interest under written agreements. The Petition states (Pages 2 and 3) that plaintiffs and other members of the class are entitled to recover from Sun for its use of the money on any one or more of the following theories or for the following reasons:
>
> a. The doctrine of unjust enrichment (*Shutts I*);
>
> b. The equitable principle of paying interest on actual use of money belonging to another (*Shutts I*, Syllabus 20);
>
> c. Equitable principles that class members receive the same treatment as gas purchasers as to interest required by FPC (*Shutts I*, Syllabus 21 and 22);
>
> d. Sun made an express agreement by filing corporate undertaking with FPC to pay interest on the 'suspended proceeds' (*Shutts I*, Page 564)."
>
> . . .
>
> "This case has an unjust enrichment feature, a basis in equity. It also has a contract feature, a basis in contract, both the oil and gas leases and the undertaking filed with FPC. Although plaintiffs' remedy may be of an equitable nature, for damages, the basis of the action arises from and grows out of written agreements. If the action is one for damages, that in and of itself does not convert it to something other than an action growing out of written contracts. (See *Baker v. Skinner*, 63 Kan. 83, 64 Pac. 981; and *Thomp-*

son v. Phillips Pipeline Co., 200 Kan. 669, 438 P.2d 146.)

"As a legal proposition, this case is identical to *Shutts v. Phillips Petroleum*, 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978). The only factual distinctions are the numbers involved and that FPC began making its rates nationally rather than regionally, beginning with Opinion No. 699. Insofar as royalty owners are concerned, the size and scope of the class was naturally determined by the size and scope of the FPC rate structure. Royalties under Opinion Nos. 699 and 770 were suspended, used by Sun and paid out in the same manner and at the same time to all of Sun's royalty owners involved in the six states where Sun produced natural gas.

"The Court adopts the choice of law discussion set forth by the Kansas Supreme Court in *Shutts I*. I have further examined the laws of all states involved herein and applying those laws and case authorities to the facts previously determined, I come to the same result concerning FERC interest rates to be applied as before. All states involved herein recognize interest rates higher than established by a general statute in cases where a contract or agreement provides a higher rate and also in cases involving equitable and moratory interest. The laws of the other states do not confiict with the laws of Kansas on the interest rate to be used.

"The interest rates to be applied herein are the FERC interest rates according to 18 C.F.R. 154.67 and as set forth above. The rates are 9% per annum simple interest to September 30, 1979, (after this case was filed in August, 1979) and thereafter at bank prime

rates averaged and compounded quarterly, as set forth above until date of judgment. . ."

"By accepting the rate increases on the condition of having to repay purchases with interest at FERC rates, even remotely prudent practices dictates that Sun invested the money so as to yield at least 9% which was the FERC rate during all the periods of suspension herein and until payout."

. . .

"Statutes of limitation questions raised by Sun at this time are a nonissue—a dead issue; but this action is not barred by statute of limitation either in Kansas or in the other states involved. . ." (Petition, A23.)

V. Kansas Supreme Court Decision

Sun appealed to the Kansas Supreme Court from Judge Renner's decision. After briefs were filed and the matter was argued orally to the Court, the Court through Honorable Harold Herd, who wrote the previous opinion in this same case, rendered its opinion affirming Judge Renner. Justice Herd has been on the Kansas Supreme Court a number of years. He came from an active practice in Comanche County, a county with substantial oil and gas production.

The opinion refers to the *Shutts* case recently decided and finds that as to interest laws of other states and interest rates applicable, "*Shutts* is controlling and requires us to find the District Court applied the proper prejudgment interest rate."

The opinion also refers to the fact that both sides had requested another notice to class members including a request for exclusion so that there would be no ques-

tion as to jurisdiction over the class members and affirmed the District Court's ruling that Sun should pay for the expense of putting out the notice.

Lastly, the opinion holds that the five year statute of limitations applies, this having been heretofore discussed.

CONCLUSIONS

1. Statute of limitations is not really an issue.

2. If it is an issue, constitutional questions are not involved and the Kansas Supreme Court has made a correct decision.

3. The Kansas Courts have faithfully complied with the mandate to determine and apply the laws of the states where the leases are located. Even though Sun might have wished for a different result, there is no federal question presented by this case and certiorari should be denied.

Respectfully submitted,

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